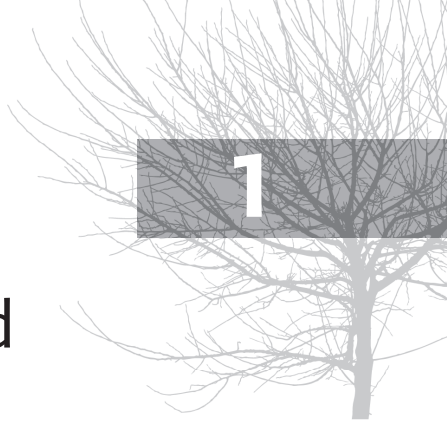

# 1

# Introduction: Torts and Tort Law


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## 1.1 What is a tort?

Unlike many legal terms (such as 'property' and 'contract'), 'tort' has no life outside the law. And yet rules and principles of tort law are relevant to a wide range of common phenomena as diverse as industrial disputes, libellous newspaper articles, road accidents, noisy neighbours, dangerous pharmaceutical drugs, vicious dogs, and so on. The word 'tort' is derived, through French, from a Latin word commonly translated as 'wrong'. However, this is an unsatisfactory translation because on the one hand, not all conduct that the law considers wrongful is tortious and on the other, not all torts consist of conduct that would colloquially be called wrongful.

The law of torts is part of private law, of which other parts are the law of property, the law of contract, and so on. Private law is contrasted with public law.

Public law is concerned with the institutions and powers of government and with relations and interactions between government and citizen. Private law regulates relations and interactions between citizen and citizen. However, these bald statements must immediately be qualified by observing that torts can also be committed by government against citizens, and vice versa; and as we will see in Chapter 11, the rules of the (private) law of torts may be modified in their application to such situations.

Some lawyers use the phrase 'the law of torts' and the term 'tort law' (or 'the law of tort') interchangeably. Others, however, think there is a significant difference between them. To understand their argument we need some history. The law is made up of a complex mass of rules and principles. To make it easier to understand and use, lawyers divide the law into 'branches' or 'areas'. The 'law of torts', or 'tort law' is one of these. The technical name for this practice of division and categorisation is 'taxonomy'. There are various ways of dividing up the law. English law (from which Australian law is derived) was originally organised along 'formulary' lines. At the heart of the 'formulary system' were 'writs'. These were the documents by which court actions were begun. A writ has been helpfully compared to 'a modern administrative form, with preprinted sets of words corresponding to the claim they are used to make, and dotted lines the applicant will fill in to explain the particulars of his case'.[1] Lawyers thought of the particulars of the case (i.e. its underlying substance) in terms of 'causes of action'—nuisance, libel, trespass and so on.[2]

The formulary system was abolished in England in the nineteenth century and this development encouraged fresh thinking about the principles underlying the various causes of action. The process is well illustrated by the development of tort liability for negligence. The concept of negligent conduct as a basis of liability began to emerge early in the nineteenth century (before the abolition of the formulary system) as a response to new social problems such as increasing numbers of road accidents. Later in the century, some jurists (including early textbook writers) argued for recognition of a general principle of liability for negligent conduct; others thought that liability for negligence should be understood in terms of various discrete relationships, such as doctor and patient, occupier and visitor, carrier and passenger, and various different activities. That category-based approach had more in common with older ways of thinking than the 'principle-based' approach.

In fact, both perspectives are still reflected in modern law. What we call 'torts'—defamation, deceit, trespass, nuisance and so on—are the modern counterparts of the old causes of action. It is this that leads some to say that we have a law of *torts* (plural), not a law of *tort* (singular). At the same time, it is not inaccurate to say that the modern law embodies a general principle of liability for negligent conduct. Ironically, however, the prime manifestation of this principle is the co-called 'tort' of negligence. The development of this modern 'cause of action' post-dated the abolition of the formulary

1. E Descheemaeker, *The Division of Wrongs: A Historical Comparative Study*, Oxford University Press, Oxford, 2009, p 191.
2. M Lobban, *The Oxford History of the Laws of England*, Volume XII, Oxford University Press, Oxford, 2010, p 888.

system and culminated only in 1932.[3] Furthermore, the modern law contains no general principle of liability for intentionally causing harm, and no general principle governing when liability, regardless of intention or negligence ('strict liability'), can arise. Nevertheless, the choice between 'torts' and 'tort' is of little practical significance, and in this book we use the terms 'law of torts' and 'tort law' interchangeably.

As a result of creation of the tort of negligence, the word 'negligence' has two meanings in modern tort law. In one sense, it is effectively synonymous with 'carelessness'. Negligence in this sense is (of course) an element of the tort of negligence, but it is also an element of certain other torts such as nuisance (see 5.1.8 and 5.2.7). In its other sense, 'negligence' is the name of a tort of which the main elements (besides carelessness) are a duty of care and damage caused by the tortfeasor's[4] conduct.

Another issue about which early textbook writers disagreed was whether it was better to organise the law around 'protected interests' or 'standards of liability' (the latter turning on whether the relevant *conduct* was 'intentional', 'negligent' or without 'fault'). Both organisational criteria are reflected in the law. For instance the torts of trespass to land and defamation are conceptualised as protecting an interest (the right to possess and reputation respectively), whereas the tort of deceit focuses on a type of conduct—i.e. 'fraud'. There are, we might say, both 'interest-based' and 'conduct-based' torts. Negligence might seem to be a quintessentially conduct-based tort. However, the 'duty of care' element of the tort reflects tort law's split personality. One the one hand, the duty element shows that the tort of negligence focuses on conduct; but on the other hand, one of its functions is to specify the interests that are protected by the tort of negligence—in other words, those interests, negligent damaging of which can attract liability.

The result of all this is that taxonomically, tort law is a mess, and the way lawyers think about this area of the law can be very confusing. This confusion is inevitably reflected in the organisation of the material in this book, one aim of which is to explain to the reader the messy way in which lawyers think.[5] A result of the taxonomic messiness of tort law is that one and the same act may constitute more than one tort because it satisfies the 'elements' of more than one tort (i.e. the requirements for being awarded a remedy). However, the problems caused by the messiness of legal categories extend further than this. For instance torts are distinguished from crimes—in other words, crimes and torts belong to different legal categories. However, the categories of tort and crime are not mutually exclusive. Some crimes are also torts: physically attacking someone, for example, or stealing their property. More importantly for our purposes, torts are also distinguished from breaches of contract and breaches of trust; and some breaches of contract, for instance, are also torts. Where conduct constitutes more than one tort or falls into more than one legal category, it is possible that a remedy may be more easily obtained, or a better remedy

3. *Donoghue v Stevenson* [1932] AC 562.
4. As people who commit torts are called.
5. This is meant as an observation more than a criticism. Life is messy, and the law reflects life.

may be obtained, by treating the act as being one tort rather than another or as falling into one legal category rather than another. To some extent, Australian law allows the plaintiff a free choice as to how to treat the conduct—for example as one tort rather than another, or as a tort rather than a breach of contract. Independently of any judgment about whether such 'concurrence' of causes of action is desirable or not, it certainly increases the law's complexity. For instance in some contexts[6] it may be necessary to decide whether particular conduct constitutes 'a tort' (as opposed to any particular tort). But because the legal category of tort law was not systematically designed and encompasses a jumble of causes of action, it is almost impossible to provide a succinct dictionary definition of the word 'tort'. In reality, tort law is what judges, legislatures and lawyers (practising and academic) say it is; and although this book, like most other accounts of tort law, discusses a relatively short list of torts, one writer quite recently identified more than 70 'torticles'.[7]

## 1.2 The relationship between tort law and other legal categories

As we have noted, tort law as we understand it today is largely the product of systemisation of the law undertaken by scholars in the late nineteenth century. An important result of this process was to emphasise the differences between tort liability on the one hand, and other bases of legal liability, such as breach of contract and breach of trust, on the other. By the end of the twentieth century, however, lawyers and courts had become just as interested in the similarities and overlaps between various legal categories as in boundaries and differences. For instance some scholars now think about tort law as part of a larger 'law of obligations' that also includes contract law, the law of restitution (itself the work of twentieth-century scholarly systematisers) and parts of the law of trusts. The purpose of this section is to locate tort law on a larger legal map.

### 1.2.1 Tort law and criminal law

For our purposes, two main differences between crimes and torts should be noted. First, the procedure for criminal trials is different from that for non-criminal (or 'civil') trials. The enforcement of the criminal law is usually left to state prosecuting authorities (although, in many cases, prosecution by a private citizen is not ruled out) whereas tort claims are normally made by the victim of the tort. However, there are some cases in which the Attorney-General may bring an action to restrain a public nuisance[8] or a breach of statutory duty;[9] and in other cases an action (called a 'relator action') may be brought in the Attorney-General's name, although the proceedings will be conducted and financed by the individual(s) on whose behalf the action is brought.[10]

6. Limitation of actions, for instance—see Chapter 19.
7. B Rudden, 'Torticles' (1991) 6 *Tulane Civil Law Forum* 105.
8. See section 5.2.5.1.
9. See section 15.1, n 7.
10. Ibid.

Second, the sanctions most commonly imposed by the criminal law are different from those usually imposed by tort law: imprisonment and non-custodial sentences, and fines paid to the state, as opposed to monetary compensation paid to the victim of the tort, and injunctions.[11] From this it is often deduced that tort law is primarily concerned with compensation, whereas the criminal law is primarily concerned with punishment and deterrence. This is an over-simplification. In the first place, there is a difference between punishing someone for having acted in a certain way and seeking to deter them from acting in that way in the future. An award of monetary compensation may have a deterrent effect, and deterrence of tortious conduct is usually seen as (at least) a subsidiary function of tort law.[12] Also, tort law sometimes requires a tortfeasor to pay damages representing some gain or benefit derived from committing the tort even though this gain does not represent a loss to the tort victim and the damages cannot be said to be compensatory. Such awards of 'restitutionary damages' can be seen as designed (in part) to deter tortious conduct.

Furthermore, in certain cases a tort victim can be awarded what are called 'exemplary' (or 'vindictive', 'penal' or 'punitive') damages.[13] The explicit aim of such damages is to punish and deter the defendant and other would-be tortfeasors. The court may award damages

> over and above those required to compensate the plaintiff for the injury suffered by him if it forms the opinion … that the defendant's conduct in committing the wrong was so reprehensible as to require that he should not only compensate the plaintiff for what he has suffered but should be punished for what he has done in order to discourage him and others from acting in such a fashion.[14]

Such damages are most commonly awarded in actions, for trespass and defamation, when the defendant has acted deliberately and outrageously in defiance of the rights of the plaintiff. The fact that exemplary damages perform a quite different function from compensatory damages is illustrated by a New Zealand case in which it was held that although compensatory damages cannot be awarded for assault and battery because of the existence of that country's statutory accident compensation scheme, nevertheless there is 'no reason in principle why a plaintiff should not sue in battery for exemplary damages *alone*'.[15] Another illustration is the case of *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* [16] in which it was held that in a case in which compensatory damages are awarded against each of several defendants jointly, exemplary damages may be awarded against one, even though they are not awarded against the other(s).

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11. Injunctions are rarely available to restrain threatened breaches of the criminal law because of the basic principle that a person is presumed innocent until proven guilty of a criminal offence.
12. According to the 'economic analysis' of tort law, deterrence is its prime function: see for example S Shavell, *Economic Analysis of Accident Law*, Harvard University Press, Cambridge, Mass, 1987, ch 2.
13. See further section 16.1.3.
14. *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 158 (Owen J).
15. *Donselaar v Donselaar* [1982] 1 NZLR 97. See generally S Todd et al., *Law of Torts in New Zealand*, 4th edn, Thomson Brookers, Wellington, 2005, pp 50–3.
16. (1985) 155 CLR 448.

Conversely, the criminal law is not solely concerned with punishment of the offender. There are statutory provisions in all Australian jurisdictions that enable courts, in criminal proceedings, to make orders requiring the offender to compensate the victim. There are also publicly funded criminal injuries compensation schemes that operate outside the law of torts and provide significant compensation to the victims of violent crimes. The importance of these two types of provision is that they show that the state's interest in crime extends beyond punishing and deterring offenders.

As noted earlier, some crimes are also torts. A wrongdoer can be both convicted of the criminal offence and held liable in tort. In many cases criminals are not worth suing in tort because they lack the resources to meet any judgment given against them. But in some contexts, tort law and the criminal law may play complementary roles in sanctioning and deterring undesirable conduct.[17] This is especially true in relation to what are often called 'regulatory offences'. For example by imposing liability for accidents in the workplace, tort law plays some part in regulating workplace safety; but much more important are safety regulations backed up by licensing of certain activities, inspection of industrial sites, and ultimately, in some instances, criminal sanctions for non-compliance with safety regulations. A similar pattern can be seen in the relationship between tort law and regulatory law in the areas, for example, of road safety, regulation of land-use[18] (to which the law of nuisance is relevant),[19] and regulation of the marketing of securities (to which the law of deceit and negligent misrepresentation is relevant). In such areas unlawful conduct may constitute both an offence against a regulatory regime and a tort.

Despite all this, very often tortious conduct will not attract criminal liability.[20] Suppose a police officer shoots a person in the mistaken belief that the person is a wanted criminal. The police officer might escape liability under the criminal law, but would be unlikely to escape tortious liability for battery (that is, trespass to the person).[21] Similarly, a person who walks onto another's land mistakenly thinking that it is their own may be guilty of no criminal offence in so doing, but they have committed the tort of trespass to land.[22]

### 1.2.2 Tort law and contract law

The relationship between tort law and the law of contract is very complex, and this is not the place to examine it at length. The interaction is considered at various points in this book. Some general comments may be helpful at this stage.

One of the functions of a contract is to enable parties to undertake binding obligations (or 'duties') to one another; and many torts consist of breaches of duty.

17. Although tort law is usually very much the junior partner in any such collaboration.
18. By means, for example, of zoning law and anti noise-pollution regulations enforced by local authorities.
19. See section 5.1.2.4.
20. The converse is also true: not all crimes are torts.
21. F A Trindade, 'Intentional Torts: Some Thoughts on Assault and Battery' (1982) 2 *Oxford JLS* 211, 219–20; *Ashley v Chief Constable of Essex Police* [2008] 1 AC 962.
22. *Basely v Clarkson* (1681) 3 Lev 37.

Indeed (as we have noted), some people now think of contract law and tort law as part of 'the law of obligations'. Contractual obligations can be distinguished from tortious obligations in various ways (but it must be stressed that none of these differences is universally present). First, many contractual obligations are 'productive' in the sense that they are obligations to produce advantageous outcomes, whereas tort law is predominantly 'protective' in the sense that the obligations it imposes are usually obligations to prevent or not to cause disadvantageous outcomes. Second, a person will normally be under a contractual obligation to do X only if they have received some form of payment in return for doing it (the technical term for such payment is 'consideration'). By contrast, a person may be under a tortious obligation not to do Y (or, sometimes, an obligation to do X) even if they have received no payment.[23] Third, most contractual obligations are owed to identified and specified individuals who have had dealings with the person subject to the obligation before the obligation arises; whereas tortious obligations may arise between 'strangers'—by which is meant persons who are unknown to or unidentified by each other, or have had no dealings with each other before the tort occurs. Fourth, the content of contractual obligations is often defined quite specifically and in some detail so that it is possible to know, in advance of performance, what will count as compliance with the contract, and when and how breaches of it might occur. By contrast, many tortious obligations are abstract and general in the sense that it is difficult to specify in advance the conduct that they proscribe and the circumstances in which proscribed conduct may occur.

Fifth, the typical justification for imposing a contractual obligation is the fact that the person subject to the obligation has done some 'voluntary' act such as making a promise, giving an undertaking, executing a deed, signing a document containing promissory statements or undertakings, boarding a bus, borrowing money, taking goods from the shelf of a supermarket. By contrast, although a few tortious obligations result from such conduct (e.g. a tortious obligation to do X may result from the giving of an undertaking to do X), the typical justification for tortious obligations is not that the person obliged has voluntarily engaged in some course of conduct (such as driving a car, or pursuing some profession), but that in so doing they have acted in a way that the law considers unacceptable and have damaged, or interfered with, or failed to protect some protected interest of another.

#### 1.2.2.1 The contract fallacy

Two propositions are fundamental to understanding the relationship between tort law and contract law. The first is the so-called 'contract fallacy', which is said to have arisen from the case of *Winterbottom v Wright*.[24] In that case A hired a carriage from D; P, a servant of A, was injured as a result of a defect in the condition of the carriage. P sued D. The action failed because the basis of P's claim was that D owed a duty of care under the contract of hire, to which P was not a party. The case was

23. But in some cases the fact that the defendant has received payment may strengthen the case for imposing a tortious obligation. See for example *Smith v Eric S Bush* [1990] 1 AC 831.
24. (1842) 10 M &W 109; 152 ER 402.

(controversially) interpreted by some as standing for the proposition that a person could not make up for the lack of a claim in contract by suing in tort. This proposition was exposed as a 'fallacy'[25] and rejected in the famous 1932 case of *Donoghue v Stevenson*[26] in which the plaintiff's[27] friend bought her a bottle of ginger beer, which allegedly contained the decomposed remains of a snail. It was held that the plaintiff could sue the manufacturer of the ginger beer in the tort of negligence for personal injury and shock even though she had no contract with the manufacturer (or indeed with anybody) relating to the drink. This case clearly established that the tortious obligation not to injure others by carelessness can arise independently of contract, and that tortious obligations can be owed to strangers. More particularly, the case forms the basis of the modern law of product liability.[28]

There are limits to these independent tort duties to take reasonable care. Courts have been rather wary of imposing tort liability for negligently caused pure economic loss (as opposed to personal injury, physical damage to tangible property, and economic loss consequential upon such injury or damage). In England there are some contexts in which economic loss in this sense is not recoverable at all in a negligence action; and in both England and Australia the class of persons who can recover for economic loss is more narrowly defined than the class of persons who can recover for other losses in the tort of negligence. One of the arguments used to support this reluctance to allow recovery in tort for negligently inflicted pure economic loss is that if a person could have protected their economic interests by making a contractual arrangement with the defendant or with some third party, then they should have done so and should not be allowed to use the law of tort to make good the lack of such contractual protection.[29]

The independence of tort law from contract law was established in one area long before 1932. At least by 1853[30] it was clear that if D intentionally induced C not to perform a contractual obligation owed by C to P, P could sue D *in tort* in respect of loss suffered by P as a result of C's breach of contract. Tort law plays a significant part in protecting a person's right to have existing contracts performed, and also the interest in making advantageous contracts in the future. Two examples of situations in which a person may incur tort liability for interfering with another's interest in making an advantageous contract are where, by threats or other unlawful conduct, D causes C not to make a contract with P, thus causing P loss;[31] and where D fraudulently or negligently tells P that C is creditworthy (when C is not), with the result that P makes a contract with C and loses money as a result.

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25. Of course, it is not literally a fallacy but simply a proposition, which, if generally applied, would produce results that courts have found unacceptable.
26. [1932] AC 562.
27. Or, more accurately, the 'pursuer's': this was an appeal from a decision of a Scottish court, and in Scots law the plaintiff is called 'the pursuer' and the defendant is called 'the defender'.
28. Chapter 13 below.
29. For more detailed analysis of this approach see section 9.5.2.6 and P Cane, *Tort Law and Economic Interests*, 2nd edn, Clarendon Press, Oxford, 1996, pp 313–16, 317–34.
30. *Lumley v Gye* (1853) 2 E & B 216.
31. See sections 6.8 and 6.10.

### 1.2.2.2 Concurrent liability

A second proposition relevant to the relationship between tort law and contract law concerns what is called 'concurrent liability'. Concurrent liability may arise where the same conduct amounts to more than one legal wrong. Here we are concerned with conduct that is both tortious and a breach of contract. Suppose D breaches a contract with P, and that the breach also amounts to a tort. It could be argued that since there is a contract between P and D, the legal rights of P and D arising out of the breach should be determined solely by rules of contract law; in other words, that D should not be concurrently liable in contract *and* tort. On the other hand, it could be argued that if D's conduct amounts to a tort as well as a breach of contract, P should be allowed to choose whether to sue D in tort or in contract. Those who support that argument are in favour of concurrent liability in tort and contract.

As we have already noted (in section 1.1), Australian law allows concurrent liability: if the defendant's act constitutes both a breach of a contractual term and a tort,[32] D can be sued either in tort or in contract. For example if a solicitor handles a client's affairs negligently, the client may sue the solicitor either in contract or tort. The concurrent liability principle also applies where a person has been induced to enter a contract by a false statement (a 'misrepresentation') negligently or fraudulently made by the other contracting party. If D is held to have *warranted* the truth of the statement (or, in other words, if the statement is a term of the contract), P may choose between suing in contract, or in tort for negligence or deceit (as the case may be).[33] D's liability in tort will be limited by any terms of the contract that effectively exclude or limit tort liability that might otherwise have arisen. Indeed, D's tort liability may in some circumstances be limited by terms in a contract between P and C to which D is not a party, or by terms in a contract between D and C to which P is not a party.[34]

The reason why the choice between suing in contract and tort may be important is that the rules governing such matters as remoteness and assessment of damages, the defence of contributory negligence, contribution between wrongdoers, and limitation periods may differ according to whether the action is brought in contract or tort. The concurrent liability principle is controversial because it allows a plaintiff to choose the cause of action that is more advantageous to himself or herself (and correspondingly more disadvantageous to the defendant). A contracting party can usually insert terms in the contract designed to exclude or limit tort liability; and this is not infrequently done. But even in the absence of such terms, some would argue that where parties are in a contractual relationship, their respective rights and obligations should be governed by the contract and by relevant rules of contract law without the plaintiff

32. Not all breaches of contract are also torts. The typical example of conduct that constitutes both is negligent infliction of damage or loss (as opposed to failure to take positive action). See further P Cane, *Tort Law and Economic Interests*, 2nd edn, Clarendon Press, Oxford, pp 129–33.
33. The law is otherwise in New Zealand, where tort remedies for pre-contractual misrepresentation have generally been abolished: *Contractual Remedies Act 1979* (NZ) s 6.
34. See section 12.4.

having the option of bypassing the contract and those rules. The issues underlying this controversy are complex and cannot be pursued here.[35]

### 1.2.3 Tort law and the law of restitution

The law of restitution deals with obligations resting on one person (A) to pay over benefits received 'at the expense of' another person (B). The benefit may have been received from B as, for example, where A has 'converted' B's goods[36] and is obliged to restore to B the goods or (more usually) their value. Alternatively, the benefit may have come from a third party as, for example, where A 'passes off' goods as being those of B[37] and is obliged to pay B damages representing the profits made as a result of the passing-off.

It is now common[38] to draw a distinction between 'autonomous' (or 'independent') restitutionary obligations and 'restitution for wrongs'. An example of an autonomous restitutionary obligation is the (limited) obligation to return money or property transferred by B to A as a result of a mistaken belief on B's part that A was entitled to receive the money or property. Such obligations can arise regardless of whether A committed a legal wrong in acquiring the benefit that A is required to restore or pay over to B. In this book we are concerned only with restitution for wrongs and, in particular, for torts.

There are two main contexts in which the law of torts imposes restitutionary obligations on tortfeasors.[39] First, where A has misappropriated B's property, B is entitled to damages based on the value of the property; or, exceptionally, to an order for the return of the property. Where A has used or exploited B's property without B's consent, B may recover damages representing the value to A of the use, even if the benefit A has thereby acquired represents no loss to B because B could not or would not have used the property in the way A did. Second, an award of exemplary (or 'punitive') damages may contain an element representing profits made by A at B's expense (as well as an element of fine).

### 1.2.4 Tort law and the law of trusts

A trust is an arrangement under which one person (the 'trustee') has an obligation to hold, manage or use property for the benefit of another (the 'beneficiary'). Certain varieties of breach of trust bear great similarity to certain heads of tort liability; and the distinction between a tort and a breach of trust is largely the result of the historical development of the English court system rather than rational development of substantive legal principles. The relationship between these two bodies of law is

35. For discussion see P Cane, *Tort Law and Economic Interests*, 2nd edn, Clarendon Press, Oxford, pp 310–13, 316; and P Cane, 'Contract, Tort and Economic Loss' in M Furmston (ed), *The Law of Tort*, Duckworth, London, 1986.
36. See section 3.3.
37. See section 6.5.
38. Following P Birks, *An Introduction to the Law of Restitution*, rev edn, Oxford University Press, Oxford, 1989. But see P Birks, *Unjust Enrichment*, 2nd edn, Oxford University Press, Oxford, 2005.
39. See sections 4.5.1 and 16.1.3 respectively. Whether such obligations may arise in any other context is currently unsettled in English law: *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2009] 3 WLR 198.

complex.[40] It suffices here to say that despite radical restructuring of the court system throughout the common law world, the distinction between torts and breaches of trust remains deeply entrenched in the law. Breach of trust is not dealt with in this book.

### 1.2.5 Tort law and property law

Finally, a brief word about the relationship between tort law and property law. As noted earlier, some lawyers now think of tort law as part of the law of obligations. One of the major divisions within the law is between obligations and property—or, as it is sometimes put, between what a person is *owed* and what they *own*. However, of course, the two categories of law are intimately related because the main way in which the law protects what a person owns is to impose obligations on others to respect their property. In some legal systems, property-protecting obligations are conceptualised as part of the law of property. In Australian law, by contrast, tort law plays a central role in protecting property rights and interests through common law causes of action such as trespass to land and conversion, and statutory intellectual property torts such as infringement of copyright. As a result, tort law rests on two quite distinct juridical foundations: one supporting protection of property rights (through 'interest-based' torts) and the other supporting protection from the infliction of harm (through 'conduct-based' torts). The tort of negligence is the major vehicle of the latter function of tort law. This is demonstrated by the fact (as it is put) that damage, not interference with rights, is 'the gist of an action in negligence'.

## 1.3 Standards of liability in tort law

Although some torts are conceptualised as interest-based and others as conduct-based, every tort involves conduct of one person that interferes with some interest of another person. Conduct will amount to a tort only if it contravenes the standard of conduct relevant to that tort. What are the standards of conduct required by tort law? In the first place, it is sometimes said that tort liability is never 'absolute'. The meaning of this statement is not clear; but it indicates, at least, that there are no cases in which the *mere* fact that A interfered with some interest of B or inflicted legally recognised harm on B attracts tort liability. Either B will have to establish that the interfering conduct was of a certain sort or quality, or there will be, in principle at least, some justification, excuse or defence that A may be able to plead. The phrase also indicates that there can be no tort liability for 'involuntary' conduct. Involuntary conduct is conduct over which the actor had no control: so, for example, a sleepwalker could not be liable in tort for acts done in a state of sleep; a person could not be liable for trespass to land if they were physically overpowered and thrown onto the land by another, or for assault if they were overpowered and used as a projectile to injure another; nor would a person be liable for negligent driving if they caused an accident as a result of having an unexpected heart attack or epileptic fit while driving.[41]

40. See further P Cane, *The Anatomy of Tort Law*, Hart Publishing, Oxford, 1997, pp 186–94.
41. But they might be liable if, despite knowing of the risk of a heart attack or of epilepsy, they nevertheless chose to drive. See section 8.4.2.

Very often tort liability will not be imposed unless the plaintiff can prove that the defendant was at *fault*. Indeed, it is sometimes (inaccurately) said that there can be 'no liability without fault' in tort law. 'Fault', as is explained in greater detail below, involves either intentional (or reckless) conduct, or negligent conduct. Sometimes, however, it will not be for the plaintiff to prove that the defendant *was* at fault, but for the defendant to prove that D *was not* at fault. In general it is harder to establish the truth of this negative proposition than of its positive counterpart, and so it is often said that casting the burden of proof on the defendant in this way has the effect of imposing liability without (proof of) fault. Furthermore, in a few types of case the plaintiff is not required to prove fault nor can the defendant escape liability by proving lack of fault. Liability without proof of fault is usually called 'strict liability'.[42]

Strict liability for the infliction of physical injury or damage is rare in the common (that is, non-statutory) law of torts. But there is one very important and extreme instance of strict tortious liability in the shape of vicarious liability:[43] in certain circumstances, A can be held liable for the torts committed by B simply because B is A's employee or agent or independent contractor, and despite the fact that injury or damage caused by B's tort may not have been the result of any fault on the part of A.

As already noted, 'fault' for the purposes of the law of tort is either 'intentional' conduct or 'negligent' conduct. Sometimes a person will be liable in tort *only* if their conduct was intentional, but often a person can be liable if their conduct was *either* intentional or negligent.[44] The concept of intention will be discussed later.[45] In a colloquial sense, 'negligence' means 'carelessness'; but in a more technical sense it means something like 'failure to take reasonable precautions to avoid foreseeable and significant risks of injury' (see section 8.3). Negligent conduct forms the basis of the tort of negligence, but it (or some version of it) also figures in many other torts that contain a requirement of fault. Negligence is not a state of mind. Rather, it is failure to measure up to a particular standard of conduct; and that standard of conduct is not normally measured according to the abilities of the individual agent but according to an 'objective' standard of reasonable conduct (see section 8.4). This means that a person may be held to have acted negligently even though, in the circumstances that they faced at the time they acted, they could not have done otherwise. In other words, the definition of fault in tort law allows a person to be held liable for doing that which they could not have avoided doing because of ignorance,

42. Strict liability is liability *regardless* of fault, not liability in the absence of fault. In other words, the plaintiff does not have to prove either that the defendant was at fault or that D was not at fault. Strict liability is meant to make things easier for the plaintiff, not harder!
43. See Chapter 17 below.
44. Contrary to what one might at first expect, a person can be held liable for negligence even if their conduct was in fact intentional. This is because harmful conduct that satisfies the definition of 'intentional' will often also satisfy the definition of 'negligent'. Intention is a state of mind, whereas negligence is failure to comply with a specified standard of conduct (regardless of the agent's state of mind). Just as strict liability is liability regardless of fault, not liability in the absence of fault, so liability for negligence is liability (for failure to comply with a standard of conduct) regardless of intention, not liability in the absence of intention.
45. See sections 2.3.2, 2.5.1, 3.2.1, 4.2.4 and 6.2.

lack of resources, inexperience or lack of skill.[46] It is often said that the objective test turns negligence into a form of strict liability, but this is misleading. What the objective test of negligence entails is that a person *should* have behaved differently, regardless of whether they *could* have behaved differently.[47] By contrast, the whole point of strict liability is that it may be imposed regardless of whether the person subject to it *should* have behaved differently. In other words, a person may be held strictly liable even if they did nothing they should not have done. A different, common argument is that the (objective) standards of conduct that tort law sets are unrealistically high, in the sense that they are beyond the reach of the average person. Whether this is so or not, readers can judge for themselves as they gain knowledge of tort law.

## 1.4 Sources of Australian tort law

The foundational concepts of tort law are found in judge-made or 'common law'[48] rules and principles. Under the doctrine of precedent, lower courts in any particular jurisdiction are, as a general rule, under an obligation to follow relevant decisions of higher courts in that jurisdiction, but not their own decisions or decisions of courts at the same level in the judicial hierarchy. Australian courts in all jurisdictions are also bound by decisions of the High Court of Australia. Tort law is primarily state (and territory) law, not federal law. Unlike the US Supreme Court, the High Court is the ultimate, general court of appeal on issues of state law as well as federal law. On this basis the Court has held that there is a single Australian common law and not a common law for each of the jurisdictions that constitute the federation. As a result,

46. Although there are exceptional cases in which lack of resources (section 8.4.1) or inexperience (section 8.4.4) can be taken into account in the defendant's favour.

47. It is often said that 'ought implies can', the suggestion being that it is wrong to blame a person for conduct they could not have avoided. This idea, the objective test of negligence, and strict liability all raise complex philosophical issues, concerning which see P Cane, *Responsibility in Law and Morality*, Hart Publishing, Oxford, 2002, ch 3.

48. The term 'common law' is used in a bewildering variety of senses. Originally it meant law that applied to the whole of England, as opposed to 'local' law that applied only, for instance, in a particular town or on the estate of a particular feudal landholder. In this sense, the 'common law' courts were the King's courts that had jurisdiction over the whole country. In a second sense, common law is distinguished from 'the law of equity'. Common law was law made and administered by the King's courts, while equity was law made and administered originally by the Lord Chancellor (the King's first minister) and later by the equity (or 'Chancery') courts. Although the formal distinction between common law courts and equity courts was abolished in England in the nineteenth century (but not in New South Wales until 1970), the distinction between common law and rules of equity still exerts significant influence. In these terms, tort law is common law. Third, 'common law' is contrasted with civil law. 'Civil law' itself is used in at least two senses. In one sense it is contrasted with criminal law. In the sense we are interested in, civil law refers to systems of law that are derived more or less directly from Roman law. Common law systems, by contrast, although influenced in various respects by Roman law, are derived from English law. Many of the world's legal systems can be categorised as common law systems, civil law systems or 'mixed' systems that combine both common law and civil law features. Finally, *as used in the sentence to which this footnote is attached*, common law means law made by judges, and it is contrasted with legislation, made mainly by legislatures and other governmental bodies. Until the nineteenth century in England, superior courts were more important law makers than the legislature. Today, the roles are reversed; but the common law still provides the background against which legislation operates because (1) most of the basic conceptual building blocks of the law were made by courts; (2) courts have the power to interpret and apply legislation; and (3) courts must answer any legal question properly posed to them even if legislation is silent on the matter.

state trial courts and courts of appeal are bound by decisions of courts of appeal in other states not only on issues concerning the interpretation of federal legislation but also on issues concerning the interpretation of nationally uniform legislation and issues of common law—'unless they are convinced the [the decision] is plainly wrong'.[49] Where a court is under no obligation to follow a particular decision, it is free to consider and apply that decision provided it does not conflict with any decision the court is bound to follow.

In fact the style adopted by judges of higher Australian courts in writing their judgments often involves extensive and detailed consideration of relevant decisions of courts in other Australian jurisdictions and in foreign common law (as opposed to civil law) jurisdictions. Because Australian law (like the law in other common law legal systems) is ultimately derived from the English law, decisions of English courts (and of the Privy Council)[50] were historically (and probably still are) more likely to be referred to in Australian judgments than decisions from other foreign jurisdictions.

This balance of sources is roughly maintained in this book. We have tried always to cite Australian authority where it is available; but we also make frequent reference to relevant English case law and, to a lesser extent, cases from other jurisdictions. As far as possible we have tried to give an account of Australian tort law; but there are issues on which there is little or no relevant Australian case law, and where there are important areas of uncertainty in Australian law we have tried to illuminate them by reference to relevant overseas decisions. Since the first edition of this book was written, Australian common law in general and Australian tort law in particular have become much more independent of foreign influence, and Antipodean tort law has, in important respects, diverged from its English roots. This trend has continued since the fourth edition was prepared. Importantly, too, English tort law is increasingly influenced by human rights law[51] and European Union law, and resulting changes in the law seem to be creating new divergences between English and Australian tort law. However, Australian courts are still respectful of English judicial decisions, and it is impossible to give a satisfactory account of Australian tort law without looking abroad in the process.

Historically, tort law was predominantly the product of judicial as opposed to legislative law-making. From the origins of English law after the Norman Conquest in 1066 until about the end of the eighteenth century, courts in England made much more law than parliament. Since the middle of the nineteenth century there has been sporadic and unsystematic legislation in the area of tort law. Until quite recently, most legislative provisions affecting tort law have favoured victims over tortfeasors by expanding the scope and grounds of tort liability and increasing the amounts of damages recoverable by victims of torts. Liability for negligently caused

49. *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 [135]; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, at [48]–[51].
50. Until 1986, state courts were bound by decisions of the Privy Council on appeal from Australian courts.
51. As a result of enactment of the *Human Rights Act 1998* (UK), which gives domestic effect to the European Convention on Human Rights.

personal injuries has been the subject of most legislative attention and as we will see in section 1.5, legislative activity in this area has increased greatly in recent years. Statutes of the United Kingdom Parliament were received into Australian law when the colonies were established, but no such statute relevant to the subject matter of this book continues to apply in Australia.[52] Courts are, of course, bound to apply statutes in force in their own jurisdiction, but doing so often requires them to interpret the words of the statute before it can be applied. Decisions interpreting statutes in force in a particular jurisdiction are used by other courts *in that jurisdiction* in much the same way as decisions concerned with common law rules. Strictly, a decision interpreting the words of a particular statute in force in one jurisdiction will be of relevance *in another jurisdiction* only if there is a corresponding statute in that other jurisdiction that uses the same or very similar words. Some Australian statutes relevant to the law of torts (those concerned with fatal accidents, for example) are modelled more or less closely on earlier United Kingdom statutes. So decisions of English courts interpreting United Kingdom statutes are sometimes relevant to the interpretation of Australian statutes.

Even when not directly applicable to the facts of the case at hand, statutes may be indirectly relevant and may influence the development of the common law on matters with which the statutes deal. Thus it has been said that 'in developing the common law of Australia … it is necessary to consider whether there is a "consistent pattern of legislative policy to which the common law in Australia can adapt itself"'.[53] Conversely, legislative consistency (or its absence) across Australian jurisdictions is relevant to deciding whether particular possible developments of the common law should be rejected on the basis that they would be inconsistent with statute.[54] The relationship between statute and the common law of tort has attracted increasing attention in recent years as a result of the proliferation in all nine Australian jurisdictions of generically labelled 'Civil Liability Acts'—statutes that include provisions dealing with various general principles of tort law—coupled with heightened attentiveness to the fact that Australia has a single, national common law. To the extent that tort statutes are limited in scope, there may be room for the common law to operate; and in such situations, the relationship between statute and common law is a particularly salient issue. Courts have also become increasingly concerned with the relationship between statutes that regulate social activities (using the criminal law, for instance) and common law actions for damages arising out of the conduct of such activities.

52. Until as late as 1985 the law of limitation of actions in the Australian Capital Territory was based on ancient United Kingdom statutory provisions (see first edition of this book, p 632).
53. *Imbree v McNeilly* (2008) 236 CLR 510, at [64] (Gummow, Hayne and Keifel JJ), quoting *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, at [23] (Gleeson CJ, Gaudron and Gummow JJ). The policy in question concerned the relationship between a learner driver and the licensed driver required by statute to accompany the learner. See also ibid, at [129] (Kirby J) (but note that the issue addressed by Kirby J was the impact of statutorily compulsory liability insurance on the common law of negligence). See also *Gett v Tabet* (2009) 254 ALR 504, at [286]–[290]. Legislative divergence may discourage restatement of the common law: *New South Wales v Fahy* (2007) 232 CLR 486, at [79] (Gummow and Hayne JJ).
54. *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 [41]; *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, at [16]–[22].

As we will see, there now appears to be a very general principle of Australian tort law (which is applied in various contexts) to the effect that common law tort liability will not be imposed if this would conflict or be inconsistent with relevant statutory provisions. These various developments witness the transformation of tort law from being a predominantly judge-made system of rules and principles to being a complex network of statute and common law.

Legislation presents a major challenge to writers of a book such as this. In the first three editions, one aim was to provide readers with detailed references to all relevant statutory provisions and discussion of differences between the provisions in various jurisdictions. In recent years, however, the volume and complexity of relevant legislation has grown so much that a decision was made, when preparing the 4th edition, to concentrate more on the statement of principles and less on technical minutiae. An inevitable result is that statute law does not figure as prominently in the analysis of tort law presented in this book as its importance in practice might be thought to require. Another result is that the book provides less information about differences between the tort laws of the various Australian jurisdictions than teachers and students may think desirable. So far as the common law is concerned, this national approach is justified by the fact that the High Court has declared that Australia has a national common law system. However, there is relatively little federal legislation and relatively little nationally uniform legislation relevant to tort law. On the other hand, all tort legislation builds on principles and concepts developed by the courts. Our view is that the best way of equipping students to understand and work with the legislation in their own jurisdictions is to provide a solid grounding in the basic principles on which such legislation is based.

## 1.5 Tort law at the beginning of the twenty-first century

Tort law is only rarely noticed by the public, and by politicians and governments; and this helps to explain why, even in the modern world where legislation is the predominant form of law-making, tort law is still basically a common law creation and is often thought of as being 'lawyers' law'. Occasionally, however, issues of tort law climb up the political agenda and generate significant public and political discussion and controversy. This happened in Australia in 2002 in the wake of a so-called 'insurance crisis'.[55] Insurance is central to the operation of the tort system. In practice, very few tort claims are made against tortfeasors who are not insured against liability. The great majority of tort claims for personal injury and death arise out of accidents on the road and in the workplace, and this is related to the fact that employers and car owners are required by law to insure against tort liability. Even if not required by law, professionals—doctors and lawyers, for instance—routinely insure against tort liability arising out of their professional activities; and householders' insurance policies typically provide protection against tort liability arising out of the state of the

55. P Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 *Melbourne ULR* 649.

premises. Liability insurance first developed as a means of protecting tortfeasors from the adverse financial consequences of being held liable. Such insurance spreads the cost of liability among a large pool of potential tortfeasors. In return for a premium, the insurer accepts the risk that the premium payer will incur liability, and pays compensation awards made against individual policyholders out of the fund created by the premiums paid by all of its policyholders.

In the course of the twentieth century, liability insurance came to be viewed as a protection as much for tort victims as for tort defendants. This explains why liability insurance was made compulsory in certain areas. But even when it is not compulsory, buying liability insurance to cover risky activities is widely considered to be both financially prudent and socially responsible. There is reason to think that one effect of liability insurance is to weaken the incentive that the risk and reality of being held liable in tort provides to encourage people not to behave in ways that are likely to attract such liability. Even so, the advantages of insurance—securing compensation for the injured without inflicting excessive financial dislocation—are widely thought to outweigh this disadvantage. The fact is that in the absence of widespread liability insurance, tort law could not operate as the significant compensation mechanism it undoubtedly is. Liability insurance is an essential component of our economic and legal system.

In 2002, premiums for certain types of insurance against tort liability—most notably, public liability[56] and medical indemnity insurance—rose dramatically. Public liability insurance protects occupiers of land (such as local councils), and organisers of sporting and other public events, against liability for personal injury suffered by visitors and participants. Medical indemnity insurance protects medical practitioners in the private health sector from liability for personal injury suffered by patients. These premium increases were, it seems, the result of various factors including the collapse of a large public liability insurer and of Australia's largest medical indemnity insurer, and excessive competition in insurance markets in the 1990s leading to the setting of unrealistically low premiums. Another alleged cause was an increase in the number of tort claims and in the aggregate amount of compensation paid out. In the absence of comprehensive and reliable statistics, the validity of this allegation was hotly contested,[57] as was the strength of a wider, related argument to the effect that in the closing decades of the twentieth century Australia had become a 'compensation culture' in which people were unwilling to take responsibility for their own health and safety and were too ready to 'blame and claim' from someone else when things went wrong. It was also argued that courts had progressively 'stretched' tort law to make it easier for plaintiffs to recover damages and to increase the amounts of damages recoverable.[58]

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56. This type of insurance protects primarily against the risk of being held liable as an occupier (see section 11.1).
57. For some evidence about rates of tort personal injury claiming (other than for road and work accidents) in the years immediately preceding 2002 see E W Wright, 'National Trends in Personal Injury Litigation: Before and After "Ipp"' (2006) 14 *Torts LJ* 233. This article also provides evidence about the impact of legislative reforms of negligence law enacted in the wake of the events of 2002.
58. An influential statement of this line of argument can be found in P S Atiyah, *The Damages Lottery*, Hart Publishing, Oxford, 1997. In Australia, J Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 *ALJ* 432 had even more impact.

The political force of these arguments arose from claims that the sharp premium increases threatened the financial viability of a wide range of community activities and the availability of specialist medical services, particularly in 'rural and regional Australia'. If buying liability insurance is a legal condition of engaging in a particular activity, the law-abiding person must either buy insurance or abandon the activity. But even when liability insurance is not compulsory, responsible citizens will not willingly engage in risky activities without being insured; and if they cannot afford insurance, they will not undertake the activity. Sudden large increases in the cost of liability insurance may, therefore, discourage people from taking up risky activities or cause them to abandon such activities. This may create significant economic and political problems if the activities in question are of great value to the community. This helps to explain why there was a period in 2002 when personal injuries law was arguably the hottest issue in Australian domestic politics.

Because of the involvement of the Commonwealth in the provision of medical services and regulation of the insurance industry, the Federal Government took the lead in dealing with the 'crisis', despite the fact that tort law is primarily a matter for the states. Various steps were taken to demonstrate the political will to act decisively, in an attempt at least to slow the rate of likely increases in premiums. One such step was the establishment, on behalf of all nine Australian governments, of a four-member panel to review the law of negligence as it related to personal injuries and death.[59] The terms of reference of the review were very broad, and explicitly required the review panel to make recommendations for legislation designed to limit liability and quantum of damages arising from personal injury and death caused by negligence. The panel was neither required nor invited to explore the link between tort law and the tort system on the one hand, and levels of liability insurance premiums on the other. It was simply to be assumed that the tort system of compensating for personal injuries was absorbing too many resources and that the scope and aggregate quantum of tort compensation being paid on account of personal injuries and death needed to be reduced in the national interest. A theme that ran strongly through the panel's terms of reference was that individuals should be encouraged to take more responsibility for their own health and safety, and that tort law ought to be changed with a view to shifting some of the burden of responsibility for personal injuries and death away from potential injurers and onto potential victims.

So great was the political pressure generated by affected groups such as local councils, medical practitioners and community organisations, as well as by the media, that there was a strong sense of urgency for change. As a result the review panel was given little more than two months to suggest wide-ranging and fundamental reforms to the law of negligence. This inevitably increased the difficulty of its task and the level of criticism and controversy that surrounded its

59. *Review of the Law of Negligence*, Commonwealth of Australia, Canberra, Sept 2002. Declaration of interest: Peter Cane was a member of the review panel.

activities, its report (*Review of the Law of Negligence (2002)*—the 'Ipp Review'), and the legislation enacted in various jurisdictions to give effect to its recommendations.

The panel proposed that its recommendations should be embodied in nationally uniform legislation. As things have turned out, however, legislation enacted in the various jurisdictions to give effect to the panel's recommendations has differed in many ways, some more significant than others. In some jurisdictions legislatures have enacted provisions the review panel did not recommend—or even, in some cases, recommended should not be enacted. Moreover, one effect of the speed with which the review panel had to work was that it had insufficient time and resources to consider properly the relationship between its proposals and the larger body of personal injuries law into which the recommended legislative provisions would be introduced. As a result, Australian personal injury law is probably now more diverse between jurisdictions, and certainly more complex, than it was before the review process started. Furthermore, the fact that many fundamental rules and principles of personal injuries law are now stated in or affected by legislation inevitably means that in future, tort law will have a degree of political salience that it has lacked in the past. Although the 'crisis' that precipitated the review process has, for the present at least, subsided, the greatly increased legislative component of personal injuries law makes it much more likely that governments and politicians will get dragged to a greater extent than formerly into debates about the tort system in particular, and about the way society deals with personal injury compensation more generally.

An aspect of personal injuries law and the tort system that has had a high political profile for many years, particularly in New South Wales, concerns liability and compensation for 'dust diseases', especially the asbestos-related conditions of asbestosis and mesothelioma. In that state there is a specialist body—the Dust Diseases Tribunal—that handles tort litigation arising out of exposure to asbestos, and some rules of tort law have been modified, in their application to such cases, to make it easier for injured people to recover compensation. The dust diseases regime is specifically excluded from the operation of the general legislation more recently enacted to limit liability and quantum of damages for negligently caused personal injuries. The number of past and potential future claims for compensation for asbestos-related diseases runs into the tens, if not hundreds, of thousands; and although asbestos is no longer mined in or imported into Australia, it is currently estimated that there will be a significant number of new asbestos-related claims for many years to come.

The long-term legacy of the mining of asbestos in Australia, and of the manufacture and widespread use of asbestos products in both industrial and domestic applications, is undoubtedly a significant social problem. Noteworthy, however, is the fact that unlike other serious social problems with which the tort system deals—road accidents for instance—this one continues to escape the influence of a recent attitudinal change, of which the 2002 Review of Negligence was only an acute symptom. The new attitude favours reversal of the tendency in personal injury law,

dating from as far back as the middle of the nineteenth century, to expand tort liability progressively to the benefit of victims of negligently caused personal injury and death.[60] The survival of the generous dust-diseases regime, and legislative curtailment of tort liability and damages in areas such as road accidents and medical mishaps, both demonstrate the influence of political, economic and social forces on the law of torts. In Australia at least, there has been significant politicisation of personal injuries law, ushering in a new era in which tort law is the cause of occasional but vigorous political debate and contestation. This is likely to continue for the foreseeable future. If it was ever right to describe tort law as technical 'lawyers' law', such a description has been well and truly overtaken by events in society at large.

## 1.6 Tort theory

It is useful to say something in this introductory chapter about the academic literature dealing with what is loosely called 'tort theory'. This is a large and difficult topic, and all that can be done here is to alert the reader to some of the issues and to introduce some terminology that may be encountered, especially in journal articles.[61]

Tort law is a product of the activities of courts, legislatures and, to some extent, academic lawyers over hundreds of years. It is misleading to think of tort law as having been designed to promote certain abstract social goals such as compensation or deterrence. The rules of tort law have always been, and continue to be, essentially pragmatic solutions to more or less specific problems presented to courts and legislatures at particular times and in particular social contexts. As hinted at the beginning of this chapter, serious attempts to impose conceptual order on this rather haphazard collection of legal norms began in the late nineteenth century with the work of the textbook writers such as Pollock[62] and Salmond.[63] These pioneering jurists treated tort law as a more-or-less self-contained system of rules and principles, divorced from their social context, and from the institutional arrangements and social practices by which the rules were actually applied and enforced. In the first half of the twentieth century, especially in the United States, scholars (known as 'realists') challenged this approach. They argued, for instance, that the division of labour between judge and jury in tort cases explained important features of tort law; and that tort 'doctrine' could not be understood independently of social practices, such as insurance, that affected its practical operation.

In the United Kingdom, these realist insights found expression in the 'law-in-context' movement. Perhaps its most basic motivating idea was that law is not autonomous but interacts in complex ways with politics, morality and other social

60. This attitudinal change has also affected the common law: H Luntz, 'Torts Turnaround Downunder' (2001) 1 *Oxford U Cth LJ* 95.
61. See also P Cane, 'The Anatomy of Private Law Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 203.
62. F Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law*, Stevens, London, 1887.
63. J Salmond, *The Law of Torts*, Stevens & Haynes, London, 1907.

phenomena. Patrick Atiyah's classic work, *Accidents, Compensation and the Law* (first published in 1970), embodied many of the movement's guiding principles. Atiyah explored the ethical foundations and political implications of tort law as a mechanism for dealing with personal injuries; its relationship to other areas of law, especially social security law; and the interaction between tort law 'in the books' (tort 'doctrine') and tort law in action (the 'tort system'). He assessed tort law in terms of aims such as compensation and deterrence, compared it with radical alternatives such as no-fault compensation schemes,[64] and examined in detail the impact of insurance on tort doctrines. Atiyah's eclectic approach had three distinct strands. The first involved critical analysis of tort doctrine, applying criteria of coherence and internal consistency. A second focused on the social operation and effects of tort law. This concern with impact has generated a significant body of empirical research investigating, for instance, whether tort law has any effect on the incidence of negligent behaviour on the roads or in the workplace.[65]

The third strand of Atiyah's work was 'theoretical'. 'Theory' may be either normative or explanatory. Explanatory theory attempts to give an account of why tort doctrine is as it is, by reference to abstract concepts such as 'economic efficiency' or 'corrective justice'. Normative theory uses such concepts as standards by which to assess the law, and as a basis for suggestions about how to improve its coherence and internal consistency or its social impact.

### 1.6.1 Economic analysis

Theorising about tort law began in earnest in the 1960s. The earliest theories were economic. The basic idea in the economic analysis of tort law is that legal rules can be used to give people incentives to behave in economically efficient ways that maximise social wealth and minimise wastage of social resources. More concretely it is argued, for instance, that negligence law, backed up by the imposition of liability for negligence, can deter people from negligent conduct and, in this way, reduce the number of accidents on the roads and at work, the incidence of adverse medical events, and so on.

Some economic analysts of tort law apparently think that this incentive theory provides a complete explanation of and justification for tort law; and that, for instance, compensating the injured is subsidiary to, or an incidental by-product of, tort law's prime function of reducing risky behaviour to an economically and socially optimal minimum. But other economic analysts take the view, most common among lawyers, that influencing the way people behave is one, but only one of the purposes of tort law. Most Australian lawyers would think that compensating the injured is at least as important as deterrence.

64. See section 1.7.
65. For a (rather old) general survey see D Dewees, D Duff and M Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously*, Oxford University Press, New York, 1996.

### 1.6.2 Corrective justice theory

Corrective justice theory was developed in reaction to the more extreme claims of some economic analysts. The concept of corrective justice is traced back to passages in Aristotle's *Nichomachean Ethics*, dating from the fourth century BCE. The central idea in corrective justice theory is 'correlativity'. Whereas economic theory focuses on the proscription and reduction of risky behaviour, corrective justice theorists stress that tort law is as much concerned with the impact of risky behaviour on the rights and interests of others. Tort law, they say, is concerned with the way individuals interact and with the effects of people's behaviour on others and interpersonal responsibility. Corrective justice theorists do not deny that tort law may affect the way people behave, or that it compensates for harm. But they insist that the only way of adequately explaining the most basic features of tort law is in terms of some concept of correlative rights and obligations of 'doers and sufferers of harm'. These central features include the facts that tort law does not compensate all injured people, but only those injured by torts; that it does not proscribe all harmful behaviour but only tortious behaviour; and that the amount of compensation relates to the harm inflicted and suffered, not the blameworthiness of the tortious conduct.

The basic objection made by corrective justice theorists to economic analysis is that it explains and justifies tort law 'purposively' or 'functionally' in terms of deterrence of tortious conduct. Corrective justice theorists make a similar objection to explanations and justifications of tort law in terms of the 'social welfare' function of compensation for harm; and to explanations and justifications of tort law in terms of multiple social functions including compensation, deterrence, and 'loss-spreading'. The goal of loss-spreading rests on the idea that the best way of coping with losses, caused by the sorts of harms for which tort law provides compensation, is by spreading the burden of such losses. From the corrective justice perspective, loss-spreading is especially problematic because the main mechanism for achieving this is insurance. Insurance is a central feature of the tort system. Without it, tort law could not operate in the way it does as a mechanism for providing compensation or regulating conduct. For the corrective justice theorist, insurance has nothing to do with what people's rights and obligations are; it is merely a practical way of protecting rights and fulfilling obligations. The rights and obligations created by tort law exist independently of their practical implementation. This shows that corrective justice theory is not concerned with the purposes or effects of tort law, or with the institutions and social practices by which it is applied and implemented, but only with the rights and obligations embodied in tort doctrine. For the corrective justice theorist, the best way to approach tort law is by studying its rules, ignoring the purposes and effects of those rules and their actual implementation.

As an approach to tort doctrine, corrective justice theory has much to recommend it. Indeed, the main function of this book is to give an account of tort doctrine and of the rights and obligations that it embodies. However, an understanding of tort law purely as a set of rules is seriously deficient. It is important also to appreciate the various functions attributed to tort law and the ends that people seek to achieve

by using it; its effects on people's lives; the institutions and mechanisms by which it is implemented (such as the settlement process); and its relationship to other legal phenomena such as insurance, social security and regulation. Such matters are addressed throughout this book, but they raise so many issues that it is possible to deal with them only incidentally.

One matter does, however, deserve explicit mention, and that concerns the relationship between the rules and principles of tort law and the resolution of tort claims. Throughout this book, tort doctrine is stated, sometimes explicitly, in terms of how a court would decide a tort claim, and we often refer to tortfeasors as 'defendants' and victims of torts as 'plaintiffs'. However, there is good reason to think that only a small proportion of torts ever become the subject of legal proceedings; and we know that of those that do, less than one per cent are resolved after a trial in court. Most tort claims are settled out of court, most even without legal proceedings being commenced. Moreover, although tort doctrine provides the background against which tort claims are settled, there is good reason to believe that the outcome of many settlements significantly diverges from what would result from application of that doctrine by a court. More importantly, this claim-oriented and court-centred way of explaining tort law should not be allowed to conceal the fact the rules and principles of tort law do not only, or even primarily, provide a basis on which to resolve disputes about the past. They also provide a set of norms to guide and regulate human behaviour in the future, telling people how to avoid incurring legal liability and becoming involved in legal disputes. Courts play a central role in the tort system because they both resolve tort disputes and, in the process, make and develop many of the rules and principles of tort law. But in another respect, the role of courts is peripheral to the main concern of this book, which is to provide an account of a set of norms of human conduct, compliance with which, it is hoped, will promote harmonious and productive social life.

### 1.6.3 Critical theory

Apart from economic analysis and corrective justice theory, there is a third main strand of tort theory that may compendiously be referred to as 'critical theory'. If critical theory has a unifying idea, it is captured in the phrase 'law is politics'. Whereas both economic analysis and corrective justice theory focus, in their different ways, on individuals and their interactions with one another, critical theory deals primarily with the social implications of tort law. Critical theorists may be happy to accept economic insights about the incentives tort law can provide and, as far as it goes, the corrective justice theorists' focus on the ideas of interpersonal responsibility embodied in tort doctrine. However, they would argue that both of these approaches conceal the social implications of tort law and the way it affects groups such as women, racial minorities and the poor. For instance, feminist theorists might say that the concept of unreasonable risk-taking in tort law gives effect to male values and views of the world. Other theorists argue that tort law reinforces social inequalities of wealth by its adoption of the principle of full compensation, which takes pre-accident

income as the basic measure of compensation. In Aristotelian terms, critical theorists are primarily concerned not with corrective justice but with distributive justice—with the way tort law affects the distribution of power and wealth in society. Critical theorists are interested not only in the distributional assumptions and the implications of tort doctrine, but also in the distributional effects of the institutions and social practices by which tort doctrine is implemented. For some, too, critical theory has a practical agenda of using the rules and institutions of tort law to further the interests of disadvantaged groups—for instance by exploring the resources available in tort law to deal with sexual harassment.[66]

In many ways, the critical theorist's approach to tort law is similar to that of many judges, and practising and academic lawyers. But whereas the typical lawyer probably tends to think of tort law as in some sense 'ideologically neutral', concerned perhaps with personal morality and responsibility, the critical theorist sees it as political to its core.

### 1.6.4 Theory and debates about tort reform

As we noted earlier (section 1.5), tort law has been the subject of much public debate in recent years in Australia. These debates can be understood partly in terms of the incentive theory of tort law. Among the catalysts of pressure for tort reform were the alleged effects that rises in liability-insurance premiums were having on the viability and continuation of activities as diverse as country fetes and the supply of specialist medical services. The argument was that rises in premiums reflected excessively high damages awards and an excessive propensity on the part of courts to hold defendants guilty of tortious conduct. The consequent burden of liability (it was said) was not having the desirable effect of making people more careful but the undesirable effect of encouraging them to abandon activities for fear of being sued. The legal response to such arguments (embodied in the Ipp Review) can be partly understood in terms of corrective justice, because one of its aims was to alter the rules of negligence law to place more responsibility on people to take care for their own safety and to discourage them from relying as much on others to protect them. From the perspective of critical theory, the main significance of such reforms lies at least partly in the way they affect the interests of social groups such as the injured, or the medical profession, or the insurance industry. For the critical theorist, the politics of tort reform are as important as the changes in the rules of tort law.

Although theorists often present their various positions as being in competition with one another, they can be seen as complementary and as each capturing part of the complex truth about tort law and the tort system. Like these various approaches to understanding and assessing tort law, this book does no more than explore one facet of the set of social practices and ethical concepts referred to as tort law.

66. For example J Conaghan, 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' (1996) 16 *Oxford JLS* 407.

## 1.7 Alternatives to the tort system

The legislative reforms of tort law and the tort system that followed the events of 2002 were incremental and relatively small scale. By contrast, over the past 50 years many proposals have been made for more radical reform and even abolition of tort law and the tort system as a mechanism for compensating victims of traumatic injuries (as opposed to illnesses and diseases)[67] suffered at work, on the roads, and on public and private premises. This is probably the most important social function of tort law and the tort system. Unfortunately, however, tort law suffers from serious defects as a compensation system. This is not the place to examine these defects in detail,[68] but it is worth noting the main shortcomings of the tort system. The first arises out of the concept of fault (by which, in this context, we mean 'negligence'). As we will see, the concept of negligence is quite abstract and fact-sensitive, and it is often very difficult to establish that conduct was negligent; moreover, many accidents on the roads and at work are not caused by negligence in the sense in which this term is used in tort law. The result is that only a relatively small proportion of victims of road and work accidents receive compensation through the tort system. The number of victims of accidents occurring in other contexts (such as the home), who make successful tort claims, is very small indeed.

Second, even in theory the tort system only compensates for injuries that were caused in particular ways; it is, in other words, a 'cause-based' system of compensation. A basic problem with all cause-based systems[69] is that they discriminate between people with precisely the same needs for compensation and treat some better than others. Indeed, the level of compensation provided by the tort system is, in general terms, quite high relative to that provided by other compensation systems. In other words, it treats a small proportion of accident victims very generously. Many people think that the difference, between being injured tortiously and being injured in circumstances that fall outside the tort system, does not justify this difference of treatment. It is not, of course, a defect of the tort system that it treats some people generously; the problem is that others with like needs are treated by the law much less generously.

Third, the tort system is extremely expensive to operate. Leaving aside court costs (because only a tiny fraction of tort claims ever reaches court), the administrative costs of delivering a dollar of tort compensation are very much higher than the costs of delivering, for example, a dollar of social security benefit. So the tort system is an inefficient and wasteful way of compensating accident victims.

These and other criticisms have led to the enactment in a number of jurisdictions of limited replacements for or complements to the tort system.[70] Indeed, the oldest

67. J Stapleton, *Disease and the Compensation Debate*, Oxford University Press, Oxford, 1986.
68. See generally P Cane, *Atiyah's Accidents, Compensation and the Law*, 7th edn, Cambridge University Press, Cambridge, 2006.
69. This problem is much more pronounced in the case of limited compensation schemes such as workers' compensation, and no-fault road-accident or no-fault medical-accident compensation schemes.
70. R P Balkin and J L R Davis, *Law of Torts*, 4th edn, LexisNexis Butterworths, Sydney, 2009, ch 12.

of such schemes—workers' compensation—date from the early twentieth century and operate in all Australian jurisdictions. Typically, workers' compensation schemes supplement rather than replace the tort system, and they dispense with the need for the worker to show that the injuries were caused by anyone's fault: the employer is made strictly liable for work injuries.

Strict liability schemes are similar to the traditional tort system in that they involve the injured person suing an individual defendant. More radical departures from the tort system allow injured victims to recover compensation from a fund financed by general taxation or levies on motor vehicle owners (for example) or a mixture of the two. The most extensive of such schemes is the New Zealand accident compensation scheme, which was enacted in 1972 and has replaced the tort system so far as it deals with accidental injuries (but, with a few exceptions, not diseases or illnesses).[71] The scheme provides compensation for all accident victims whether or not they would previously have been entitled to tort compensation, and so it is called a 'no-fault' scheme. Several Australian jurisdictions have no-fault road-accident compensation schemes, but (with the exception of the Northern Territory road-accident scheme) they only supplement the tort system and do not replace it. An attempt in the 1970s to set up a national scheme along the lines of the New Zealand scheme foundered on the rocks of financial stringency and lack of political will. More recent proposals for no-fault schemes for road accidents (in New South Wales)[72] and medical accidents[73] suffered a similar fate. Ongoing political activity relevant to the tort system revolves around proposals for a national system for provision of care and support to the disabled.[74] The biggest cause of disability is ageing, and only a very small proportion of disability results from incidents that could, even in theory, form the basis for a tort claim. However, the tort system is a significant source of provision for 'the catastrophically disabled' and has to be taken into account by policy-makers, at least in relation to this relatively small group. One option would be to remove such cases entirely from the tort system, although how this would work in practice is unclear. At all events, it seems likely that the tort system will continue to provide an important source of personal injury compensation for the foreseeable future, and so it is important to think of less radical reforms that might ameliorate some of the shortcomings of tort law and the tort system.[75]

Another important type of non-tort compensation scheme is the criminal injuries compensation scheme. Such schemes now exist in all Australian jurisdictions and, because perpetrators of violent crimes are typically not worth suing, provide a very important supplement to the tort system. Compensation is paid out of a fund

71. See S Todd et al., *The Law of Torts in New Zealand*, 4th edn, Thomson Brookers, Wellington, 2005, chs 2 and 3.
72. H Luntz and D Hambly, *Torts: Cases and Commentary*, 5th edn, LexisNexis Butterworths, Sydney, 2002, pp 30–49. But see *Motor Accidents (Lifetime Care and Support) Act 2006*.
73. D Marshall, 'No-Fault Compensation for Medically Caused Injury: A Comment on the Current Proposal' (1991) 21 *WALR* 336.
74. See for example Productivity Commission Issues Paper, *Disability Care and Support*, May 2010.
75. See for example P Cane, *The Political Economy of Personal Injury Law*, University of Queensland Press, St Lucia, 2007.

financed by general taxation, but the schemes are not no-fault schemes because although they do not involve suing an individual, the applicant must establish that (s)he has been the victim of a violent crime; and violent crimes are typically torts as well.

Because a significant proportion of accident victims who could, in theory, utilise the tort system, receive nothing by way of tort compensation, many accident victims rely heavily on social security for financial support; and we will see (section 16.3.4) that a complex set of rules has developed concerning the relationship between social security benefits and tort compensation. In our terms, social security benefits are no-fault benefits.

The existence of these various alternatives to the tort system shows that tort law must be seen as only one part of a complex network of arrangements for dealing with the financial effects of personal injuries and disability; and because the proportion of disabled people and victims of personal injuries who receive compensation through the tort system is very small, tort law is correspondingly of limited practical importance. The legislative response to the shortcomings of the tort system has been extremely patchy, and has largely resulted from the operation of political forces rather than of any principled approach to the serious social problems generated by personal injuries and disability.

Of course, tort law deals with many things other than personal injuries suffered in 'accidents'. In some cases there is no real alternative to tort litigation (or the threat thereof) as a means of protecting the interests involved; protection of business goodwill by the tort of passing off is an example. In other cases tort law plays a very marginal role: for example the tort of nuisance is, in practice, little used to regulate land use. In some areas the role played by tort law is problematic and controversial: for example the use of the 'economic torts' to deal with industrial disputes has been a matter of vigorous political debate ever since it became important in the late nineteenth century; and many people consider that the availability of tort damages as the chief means of vindicating reputation (through the tort of defamation) operates as an encouragement to fortune-hunting and court-endorsed mud-slinging. Once again, the reason for raising these points is to alert the reader to the fact that tort law is one, but in many cases only one, means for protecting a range of human interests; that the protection it provides is often limited and unsatisfactory; and that tort law is not a politically neutral set of rules but a complex set of institutional arrangements that needs to be examined in a wider context and subjected to critical analysis if its strengths and weaknesses are to be understood properly.